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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. 133

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

EDWIN H. BURGESS,
C. R. WEBBER,
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W. J. LARRABEE,
M. B. PIERCE,
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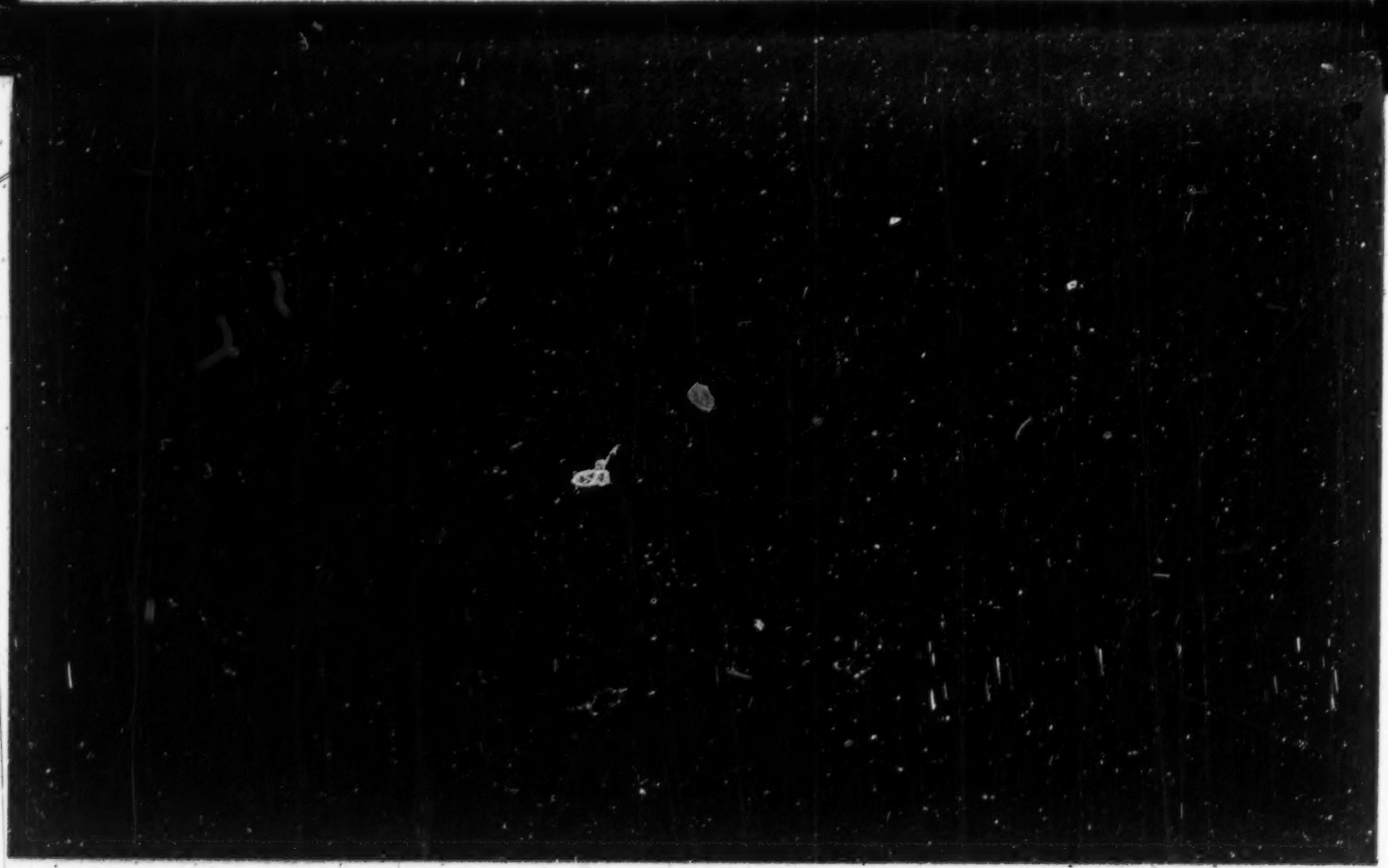

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STATUTES CITED.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Equity No. 84,402.

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL., *Plaintiffs,*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants.*

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

STATEMENT AS TO JURISDICTION ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

The plaintiffs, appellants, in support of jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, and in compliance with Rule 12 of the Rules of the Supreme Court, respectfully represent:

I.

Statutory Provisions Sustaining Jurisdiction.

It is provided in Sections 41 (28), 44 and 47 of Title 28, United States Code (Ch. 32, 38 Stat. L. 219-220) that an

action may be brought to enjoin, set aside, annul or suspend, in whole or in part, any order made or entered by the Interstate Commerce Commission, by petition to any District Court of the United States, and that the judge of such District Court shall immediately call to his assistance to hear and determine the matter two other judges, one of whom shall be a circuit judge. Section 47 also provides that an appeal may be taken direct to the Supreme Court of the United States.

Section 47a of Title 28, United States Code, (Judicial Code, Section 210, Chapter 32, 38 Stat. L. 220) provides as follows:

> "A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. * * * The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court * * *."

In addition, it is further provided in Section 345 of Title 28, United States Code (Judicial Code, Section 238, Chapter 229, 43 Stat. L, 938), that a direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had in certain classes of cases, including in subdivision (4) of said Section:

> "suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money".

II.

Decree.

The decree sought to be reviewed herein dismissed plaintiffs' petition and was entered March 23, 1938.

The petition for appeal was filed on the 25th day of April, 1938, and the order allowing the appeal was entered on the 25th day of April, 1938.

III.

Nature of Case and Ruling of the District Court.

This suit was brought in a specially constituted District Court of the United States for the Southern District of New York against the United States, by the plaintiffs, appellants, The Baltimore and Ohio Railroad Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; The New York Central Railroad Company and The Pennsylvania Railroad Company, under authority of the Act of Congress approved October 22, 1913, 38 Stat. at L. 219 (28 U. S. C. A., Sections 41 (28) 44, 45, 46, 47) and under the general equity jurisdiction of the Court.

Plaintiffs prayed for a decree enjoining, setting aside, suspending and annulling an order of the Interstate Commerce Commission, dated February 2, 1937, and the reports of said Commission therein referred to, in a proceeding before that body entitled, "*Ex Parte 104, Practices of Carriers Affecting Operating Revenues and Expenses, Part VI, Warehousing and Storage of Property by Carriers at the Port of New York*". The said order and reports of the Interstate Commerce Commission required the plaintiff railroads to cease and desist from leasing space to shippers in warehouses, buildings or piers in the New York Harbor district at rentals which fail to compensate plaintiffs for the cost of providing the space leased, and from storing, handling or insuring goods of shippers at rates and charges which fail to compensate plaintiffs for the cost of performing such services.

Plaintiffs' petition for a decree to set aside, enjoin, suspend and annul the operation and enforcement of the said order and reports of the Commission was filed March 10, 1937, in the District Court of the United States for the Southern District of New York. Hearing before said Court, specially constituted of three judges pursuant to the aforesaid Act of October 22, 1913, was duly held, at which all the evidence of record before the Interstate Commerce Commission was received in evidence. Thereafter, on August 25, 1937, an opinion by said Court, together with a supplemental opinion by one of the judges thereof, was handed down denying plaintiffs' prayer for injunction and dismissing their petition. A copy of each of said opinions, marked respectively, Exhibit "A" and Exhibit "B", is hereto annexed, and made a part hereof. No other opinions in this cause have been rendered by any court.

On March 23, 1938, Findings of Fact and Conclusions of Law in support of the Court's opinion of August 25, 1937, were made and filed by the District Court, and on that date the Court also made and entered its final decree dismissing the plaintiffs' petition for injunction.

Plaintiffs' practices as to the leasing of space in warehouses, buildings and piers, and the storage, handling and insurance of goods, which are prohibited by the Commission's order, are long standing in the commercial life of New York Harbor and were begun in good faith, long prior to the prohibition of said order, at a time when it was not and could not have been anticipated that "cost" to plaintiffs of providing such space and rendering such services, rather than the reasonable value thereof, was or might become the test of their lawfulness. The Commission's order in requiring absolute adherence by plaintiffs to the "cost" standard as the test of the lawfulness of their leasing of space and

rendering of services, is at variance with other decisions of the Commission and the courts as to the tests of lawfulness of such practices by carriers.

The questions presented by this appeal are substantial. They involve the sufficiency in law of the findings made by the Interstate Commerce Commission, and sustained as sufficient by the District Court, to support the Commission's order under attack. The order rests (a) upon findings that plaintiffs make leases and perform services at less than "cost" to them of so doing and thereby make "concessions" from their published tariffs of line-haul transportation charges which constitute unlawful discriminations and prejudices, in violation of Sections 2, 3 and 6 of the Interstate Commerce Act, and (b) upon the further finding that although plaintiffs have published and uniformly observed tariffs covering the "in-transit" storage, handling and other services rendered by plaintiffs in connection with goods that are in process of transportation over plaintiffs' railroads, plaintiffs are nevertheless as to such services, guilty of concessions, discrimination and prejudice, in violation of Sections 2, 3 and 6 of the Interstate Commerce Act. The issue is whether such findings on the part of the Interstate Commerce Commission are adequate and sufficient in law to establish such violations of the Act.

The appeal also involves the power of the Commission to prevent plaintiffs from making leases and rendering services at less than "cost", except upon findings that the less-than-cost basis is also less than the reasonable worth of such leases and services as ordinarily measured by prevailing market values.

These questions, it is submitted, are substantial and of wide-spread importance owing to the prevalence and long duration of plaintiffs' practices and similar practices of other railroads generally.

IV.

Cases Sustaining Jurisdiction.

Interstate Commerce Commission v. *Union Pacific Ry. Co.*, 222 U. S. 541.

Florida East Coast R. Co. v. *United States*, 234 U. S. 167.

The Los Angeles Switching Case, 234 U. S. 294.

Louisville & G. R. Co. v. *United States*, 242 U. S. 60.

Manufacturers R. Co. v. *United States*, 246 U. S. 457.

Skinner & Eddy Corp. v. *United States*, 249 U. S. 557.

New England Divisions Case, 261 U. S. 184.

Virginian Railway Co. v. *United States*, 272 U. S. 658.

Beaumont, Sour Lake & Western Railway Co. v. *United State*, 282 U. S. 74.

Florida v. *United States*, 282 U. S. 194.

Merchants Warehouse Co. v. *United States*, 283 U. S. 501.

United States v. *Baltimore & Ohio*, 293 U. S. 454.

United States v. *C. M. St. P. & P. R. Co.*, 294 U. S. 499.

Respectfully submitted,

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Filed May 3, 1938.

EXHIBIT "A"

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE BALTIMORE & OHIO RAILROAD COMPANY, *et al.*, *Plaintiffs*,

against

THE UNITED STATES OF AMERICA, *Defendant*, and INTERSTATE COMMERCE COMMISSION *et al.*, *Intervening-Defendants*.

Before Chase, Circuit Judge and Patterson and Hulbert, District Judges.

In Equity. Petition by seven railroad companies engaged in Interstate Commerce to enjoin and set aside an order of the Interstate Commerce Commission.

Thomas P. Healy, Carleton W. Meyer, Solicitors for above-named plaintiff.

Alex H. Elder, Richard J. Laly, Counsel for the Central Railroad Co.

A. Lane Cricher, Counsel for American Warehousemen's Ass'n Merchandise Div.

Orrin G. Judd, of Counsel.

Henry E. Foley, Solicitor for Intervenors; Searles, James & Tyng, of Counsel.

John J. Hickey, Solicitor for Intervenor, Warehousemen's Protective Committee.

Edwin H. Burgess, Solicitor for Plaintiffs; Charles R. Webber, Walter J. Larrabee, M. B. Pierce, Guernsey Orcutt, of Counsel.

Elmer B. Collins, Special Assistant to the Attorney General.

J. Stanley Payne, Assistant Chief Counsel, Interstate Commerce Commission.

Robert H. Jackson, Assistant Attorney General.

Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission.

CHASE, *Circuit Judge:*

This suit was brought by seven common carriers in interstate commerce under the provisions of the Urgent Deficiencies Act and heard by a court of three judges constituted as the law requires. (38 Stat. 219; 28 U. S. C. A. Secs. 41 (28) and 43-48, inc.).

The plaintiffs are The Baltimore and Ohio Railroad Company; The Central Railroad of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; The New York Central Railroad Company; and The Pennsylvania Railroad Company. All of them transport freight by rail to and from the Port of New York District in interstate or foreign commerce or both. They all provide warehouse space and services for such freight both of the kind shown as in-transit and that classed as commercial; the latter kind being what is not essential to actual transportation of the goods. The plaintiffs are competitors among themselves for both the eastbound and westbound New York traffic and also with private corporations owning and operating warehouses in the New York District for that part of the business which is done by warehousemen.

The Interstate Commerce Commission undertook, on July 6, 1931, an investigation on its own motion in a proceeding entitled, Practices of Carriers Affecting Operating Revenues and Expenses, in which all common carriers by rail subject to the Interstate Commerce Act were made parties, to determine whether those carriers were being operated economically and efficiently within the provisions of Sec. 12 and 15 (a) of the Act. Thereafter, its attention was especially directed by complaints of warehousemen in the Port of New York District to the warehouse practices of the plaintiffs in that district and on January 6, 1932 it began an investigation, known as Ex Parte 104, in connection with its general proceeding above mentioned for the purpose of "* * * establishing facts concerning all policies, practices, services and charges in connection with warehousing and/or storage of freight by carriers serving the Port of New York District, * * *"

The object of this suit is to enjoin and set aside an order entered on February 2, 1937 by the Interstate Commerce Commission in subdivision Ex Parte 104 of the original proceeding requiring the plaintiffs to cease and desist before a future date fixed (and later extended so that it has not as yet become effective) from certain practices of which we are concerned only with that part which prohibits all the plaintiffs (except the Central Railroad of New Jersey as to furnishing insurance) from permitting shippers in interstate commerce over their lines from using space by lease or otherwise in warehouses, buildings or piers of the plaintiffs at rates and charges which do not compensate the plaintiffs for the cost of providing such space; from storing goods shipped over their lines in interstate commerce or providing commercial storage for shipping at less than cost; from directly or indirectly handling goods for shippers at such warehouses, buildings or piers at rates and charges which fail to compensate them for the cost of such handling; from insuring such goods for shippers at less than cost; and from "* * * applying, by means of tariffs now on file with this Commission * * * non-compensatory rates and charges * * * for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce which goods are stored, handled or insured in connection with commercial warehousing service". The Central Railroad of New Jersey also seeks to enjoin and set aside that part of the order prohibiting it from "subsidizing and granting concessions to the Newark Central Warehouse Company by means of non-compensatory rentals collected or received for the space leased by the Newark Central Warehouse Company from said * * * carrier".

Before the order was made, the Interstate Commerce Commission had conducted hearings at length at which all parties were given the opportunity to present evidence and be heard. The Warehousemen's Protective Committee, an organization representing the independent warehouses in the District was allowed to intervene and take part. The City of Boston; the Boston Port Authority; and the American Warehousemen's Association, Merchandise Division, have become intervenors in this suit. The Commission filed its

first report on December 12, 1933 wherein it admonished the plaintiffs to change the practices it disapproved but made no order. On June 8, 1936, it filed a second report; and on February 2, 1937, a third report, which reaffirmed the others in so far as is now important, and made the order herein resisted. The order attacked is, accordingly, based upon the findings in all three reports.

In view of the restricted nature of the issues presented, it will not be necessary to state at length the substance of these reports to which reference, however, is made. It is sufficient presently to know that upon adequate evidence the Commission has found that the plaintiffs now do at less than cost all those things which the order prohibits them from doing at non-compensatory rates and charges. There is no finding that they do not conform to their published tariffs in so far as such tariffs cover the services provided but the indirect violation of Sect. 6 of the Interstate Commerce Act by the forbidden practices has been found in that those permitted to receive such below cost-services in effect move their goods at less than tariff rates and receive preferential treatment in violation of Sect. 3. While others not so favored are discriminated against in violation of Sec. 2.

The common complaint of all the plaintiffs is that the order was made after the denial of their motion to reopen the proceedings for the purpose of introducing evidence to show that the condemned services were provided at charges equivalent to their fair and reasonable value; that there are no findings sufficient to support it in that the Commission did not find that what the plaintiffs provided for shippers at less than cost was provided at less than the fair and reasonable value; and that cost is too vague and indefinite a term to make the order sufficiently definite to enable them to comply.

All this boils down to the one issue of whether or not the findings are sufficient support in law for the order made. If they are the plaintiffs were not prejudiced by the denial of their motion to reopen the proceedings. It is clear that the order must be based upon findings, supported by the evidence, which show it to be within the jurisdiction of the Commission as derived from the Act. United States *v.* Chi-

cago, M. St. P. & P. R. Co., 294 U. S. 499. The power to make the order, therefore, depends upon whether the providing of such services as were found to have been furnished for less than cost violates the Act in that some shippers are given more favorable treatment than others in like situation. It is not denied that that result would follow if such services were performed for some shippers only at less than their reasonable worth but it is insisted that reasonable worth and not cost is the true criterion by which their practices must be tested in the light of the provisions of the Act.

The argument, further developed in discussing later the special complaint of the Central Railroad of New Jersey, is that the plaintiffs have invested in warehouse facilities in the New York district at prices so high that they cannot successfully compete with warehousemen in that territory if they charge enough to return to them the cost of the service since their overhead is necessarily so high. That, of course, depends upon what treatment should be accorded excessive investment under accepted accounting standards in figuring cost. We are not now called upon to go into that subject. Moreover, we find no real substance to the argument that cost is too vague a term upon which to base the order. Cost is certainly as definite as the fair value standard for which the plaintiffs contend and since it can be figured from past actual experience would seem to be much more so. Indeed, it is idle to argue that cost does not admit of such definite calculation that the plaintiffs cannot comply with the order.

In any event we think the cost basis has been approved by authority which binds us. In New York, N. H. & H. R. Co. *v.* Interstate Com. Commission, 200 U. S. 351, 50 L. Ed. 515, the sale and transportation of coal at less than the cost of the coal plus transportation at tariff rates was held to violate Secs. 2, 3 and 6 of the Interstate Commerce Act. In giving effect to the remedial provisions of the Act to prevent discrimination between interstate shippers and the granting of preferences either directly or indirectly, we can find no real distinction between furnishing transportation of goods plus commercial warehousing, or insurance, or both

at rates less than those of the published tariff plus the cost of what warehousing and insurance is furnished and the sale of coal to be delivered at a price which did not cover its cost in addition to the tariff rates for transportation. In the present instance commercial warehousing, storage and insurance was sold instead of coal, a circumstance creating no difference so far as the principle which controls is concerned.

Though it is true that the published tariffs of the plaintiffs cover what is called in-transit storage and such tariff rates have been charged uniformly, it by no means follows that Sec. 2 and 3 have not been violated by the practices forbidden by the order. In its second report the Commission said: "The transit privilege permits the stopping of goods at an intermediate point between the point of shipment and final destination, and the reshipment from the intermediate point at the through freight rate lower than the combination of local rates which the shipper would otherwise pay. The privilege is of great importance to many shippers and its commercial necessity has long been recognized. We are not to be understood as condemning bona fide transit arrangements, but only the practice here considered in which the carriers, through stress of competition, have assumed by tariff publication a part of the cost of strictly commercial storage and handling of goods. * * * ". And in its third report the Commission said in reference to this subject; "What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations, and by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act, in that through them respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them and thereby violate sections 2, 3 and 6 of the act".

The violations of the Act which were amply proved and which the Commission pointed out broadly as the above

quotations show are based upon the voluntary performance by the carriers for some shippers only, in order to get or keep business, of commercial services in connection with transportation services at rates and charges which when added together do not return to the carriers the published tariff rates plus the cost of the commercial services. As to what are commercial services, see Merchants Warehouse Co. v. United States, 283 U. S. 303. To the extent that such cost is not returned, the tariff rates for the transportation are in effect reduced as much as though a rebate to such shippers to the amount of the carriers' loss had been paid. And this is so whether the voluntary commercial services performed by the carriers to get or hold business in the face of competition are charged at their fair value or not. If the carriers sustain losses in performing voluntary commercial services for shippers as an inducement to them to buy transportation of the carriers at the published tariff rates for the goods as to which such voluntary commercial services are performed, it can make no difference, in the effect of such practices on the tariff rates, that the voluntary commercial services were charged at their fair value if that happens for whatever reason to be less than the cost to the carriers. To the extent that the carriers are out of pocket because of the performance of such voluntary commercial services in connection with transportation furnished a shipper, their published tariff rates for such transportation are cut. We are now dealing with the requirement for the maintenance of the published tariff rates for transportation which the Act makes applicable alike to all shippers under like circumstances and if the inducing commercial service which the carriers perform for some shippers to get or hold their business has the effect, as has been made to appear by the evidence and has been found by the Commission, of cutting those tariff rates because out of such rates a loss must be deducted to get the true net transportation return, the transportation service is furnished by the carriers to those shippers for less than to others whether the loss deduction results from commercial services performed at their fair value or not. That is the vice the order is designed to do away with and it will not

be cured if the fair value standard is substituted for the cost standard in respect to commercial services performed to get or hold transportation business. If the cost to the carriers of the inducing commercial services performed is more than the charges for those services, the lessening effect upon the published tariff rates for transportation and the consequent violation of the Act allow as surely whether the commercial services are charged at their fair value or not. In other words, fair value is immaterial except on the question of efficiency in connection with the determination of loss. So we agree with the Commission that the condemned practices do violate the Act and hold the order supported by the findings and generally within the scope of the Commission's power.

The New York Central Railroad Company was found to have leased space in its warehouses to the Mellish Company and the Auto Storage Company at less than cost for the storage of automobiles. These lessees were found to be shippers in interstate commerce over the New York Central's lines; to be competitors of warehouse companies in the New York District who were also shippers in interstate commerce over that railroad; and that the railroad paid allowances to those lessees for unloading and handling automobiles which were commercial services. The railroad has especially attacked these findings. In view of what was said as to commercial services and shippers within the meaning of the Act in Warehouse Co. *v.* United States, *supra*, we think the findings were justified by the evidence.

The Central Railroad Company of New Jersey, through a wholly owned subsidiary called the Newark Warehouse Company, built a large warehouse in Newark, N. J., in 1905. The railroad rented part of the building from its subsidiary for station space from 1906 to 1932 and the subsidiary operated the remainder as a warehouse until 1934 by which time it had accumulated a large deficit that had been increased by the termination of the railroad of its lease for station space in 1932. The building, after unsuccessful attempts had been made to sell it, was leased on June 1, 1934, to the Newark Central Warehouse Company, not connected

with the railroad or its subsidiaries, at a varying annual rental, based in part upon the earnings of the lessee, with the privilege of renewal after two years. The rental received during the first year was a little less than half the taxes on the building for that year and it is clear that the Commission's finding that the lease is non-compensatory is correct. The Newark Central Warehouse Company, as justifiably found by the Commission, "engages in a general warehouse business and performs any and all services necessary in conducting that business. In many instances it has dominion for transportation purposes as consignee or consignor * * * over goods shipped in interstate commerce and stored by it. It engages in whatever branch of the general warehousing business it considers profitable, including the handling of cars containing shipments for two or more consignees and occasionally handles the equivalent of pool cars. In some cases the warehouse company pays the freight charges to the railroad and later collects from the owners of the goods". This lessee is a shipper in interstate commerce over the railroad lines in competition with other such shippers and to the extent that it is allowed to use the railroad's warehouse (we treat the building as owned by the railroad as have the parties though the title is in a wholly owned subsidiary) at the expense of the road for commercial purposes in connection with the transportation services it buys of the road the published tariff rates of the railroad are in effect cut to it. This would be plain enough if the railroad let the Central Company so use the warehouse for nothing and an inadequate rental which has the effect of cutting the published tariff rates to the favored lessee shipper is a violation of Secs. 2, 3 and 6 of the Interstate Commerce Act. Central of Georgia Ry. Co. *v.* Blount, 238 Fed. 292. The prohibition of the order is the leasing at a non-compensatory rental of space which subsidizes and grants concessions to the lessee. The Commission drew the conclusion in its second report from sustaining evidence, "* * * that the warehouse is an adjunct of the railroad's traffic department, (and) that the latter has made continuous and intensive efforts to solicit traffic over its line for storage in the warehouse". That it had an in-

centive to do that not only to increase its traffic but also to increase its net rent under the terms of the lease is plain enough. It is no answer to the violations of the statute to say that as the railroad has a losing piece of property on its hands which it acquired in good faith it should be permitted to rent it for its fair rental value. That is true only provided so doing does not violate the law. While it may lawfully minimize its losses from bad investments it may not give concessions to a favored shipper which in effect permit the railroad to cut its published tariff rates to that shipper. In this respect all carriers subject to the provisions of the Interstate Commerce Act must stand and be treated alike whether they have made poor investments or not.

In what we have said we have reference, as did the Commission, to the necessity for rates and charges and rentals for commercial services which will not reduce in effect the published tariff rates for transportation services including such in-transit handling and storage as are properly included in such published tariffs. As such below-cost commercial services are distinguishable from what are properly transportation services we do not come into conflict with the principle that reasonable tariff rates need not be sufficient to give railroads a fair return on every transportation service rendered in respect to every part of its property so used. See, St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649; Atlantic C. L. R. Co. v. North Carolina Corp. Com. 206 U. S. 1.

We, therefore, are of the opinion that the findings of the Commission supported by the evidence show that it had the power to make the order in so far as it concerns every plaintiff and that the order is sufficiently certain and definite in terms to enable the plaintiffs to comply.

Bill dismissed with costs.

Concur

ROBERT P. PATTERSON,
U. S. D. J.

Filed August 25, 1937.

EXHIBIT "B".

No. 869.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

E 84,402.

THE BALTIMORE AND OHIO RAILROAD COMPANY *et al.*, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*.

HULBERT, *D. J.*, concurring:

With some misgiving, I concur in the opinion of Circuit Court Judge Chase whose conclusions are inescapable under the law as it now is.

The voluntary inquiry instituted by the Interstate Commerce Commission "Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues and Expenses" was upheld, generally, by the Supreme Court of the United States in the case of *United States of America and Interstate Commerce Commission, appellants*, vs. *American Sheet and Tin Plate Co., et al.*, No. 734, October Term, 1936, and particularly with reference to Part 2 of that proceeding having to do with terminal services.

The plaintiffs in the case now before this Court have published tariffs including the in-transit storage as well as the rates of carriage. The Interstate Commerce Commission has found that under the published tariff rates the storage charges at less than cost is a discrimination.

Under the doctrine enunciated in *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, I agree there is no practical distinction between service charges on the basis of cost and reasonable or fair value, but I am apprehensive that the effect thereof will be to substitute the uncertainty of rates in reliance upon

business competition for the certainty of published tari rates and as a practical result the cost to shippers, an incidentally to the public, may, and probably will, increase since the warehousemen are not subject to any regulatory authority whatsoever.

(Sgd.) HULBERT,
U. S. D. J.

Dated, N. Y., Aug. 24, 1937.
Filed Aug. 25, 1937.

(6318)